Siu Yan Tam (f) v Collin Swee Lay Keong

HLGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22NCVC-168 OF 2010
PRASAD ABRAHAM J
24 AUGUST 2010

Succession — Executors — Revocation of appointment, application for — Brother of deceased appointed as executor under deceased will — Matrimonial differences between deceased and his wife — Wife completely left out as benefactor under deceased will — Application by wife of deceased to be appointed as executor or co-executor — Intention of testator paramount — Will not to be rewritten — Whether there was valid reason to replace executor

The late Dato' Dr James Swee Lee Kong ('the deceased') together with the plaintiff (his wife of 18 years) were blessed with two sons (Jonathan (17 years old) and Jeremy (12 years old)) ('beneficiaries'). On or about the end of August 2008, matrimonial differences between the deceased and plaintiff arose. The deceased lost complete trust for his wife and executed a will whereby the plaintiff was completely left out as a benefactor. The deceased appointed the defendant (his brother) as the sole executor and trustee of his estate for the benefit of the beneficiaries. The will was signed and witnessed on 25 May 2009. Around March 2010 the deceased was diagnosed with leukaemia and subsequently passed away on 29 May 2010. The defendant filed a petition for the grant of probate. However, the plaintiff lodged a caveat against the petition and filed the current suit. The plaintiff relied on s 4(3) of the Probate and Administration Act 1959 ('the Act') read together with s 20 to support her claim to be either a co executor of the estate of the deceased or to replace the defendant as such.

Held:

(1) The intention of the testator is paramount and having evaluated the evidence of the state of detonation of the relationship between the deceased and the plaintiff, the deceased clearly had in mind to positively exclude the plaintiff either as an executor and/or the co executor and the deceased intention and wishes must be given effect to. It therefore followed that the executor named in the will ie the defendant should be the executor of the will (see para 3).

(2) The court could not find any basis to sustain the charge of incompetency and negligence against the defendant. The defendant acted as a prudent executor taking into account the interest of the estate of the deceased and the beneficiaries (see para 6(a)).

(3) The only person objecting to defendant remaining as the executor of the deceased being the brother of the deceased, was the plaintiff. The sons of the deceased were in court but never testified against the defendant. The orders eventually granted by the court followed the terms of the will and also made provision for the beneficiaries in respect of their expenses pursuant to s 36(i) of the Trustee Act 1949 (see para 6(d)).

(4) The plaintiff was unsatisfied as no provision was made for her. This would tantamount to a rewriting of the terms of the will and the sanctum of respecting the deceased wishes. The plaintiff was not without means and evidence showed the plaintiff had substantial funds in Hong Kong. For these reasons, the court did not allow the plaintiff's claim (see para 6(d)).

[Bahasa Malaysia summary

Mendiang Dato' Dr James Swee Lee Kong ('si mati') bersama dengan plaintif (isterinya yang selama 18 tahun) dikurniakan dengan dua anak lelaki (Jonathan (17 tahun) dan Jeremy (12 tahun)) ('benefisiari-benefisiari'). Pada atau sekitar hujung bulan Ogos 2008, perbezaan perkahwinan di antara si mati dan plaintif telah berbangkit. Si mati hilang kepercayaan terhadap isterinya dan melaksanakan wasiat di mana plaintif tidak dinamakan sebagai penumbang. Si mati melantik defendan (saudara lelakinya) sebagai satu-satunya wasi dan pemegang amanah estetnya untuk faedah benefisiari-benefisiari. Wasiat tersebut ditandatangani dan disaksikan pada 25 Mei 2009. Pada Mac 2010 si mati didiagnosis dengan leukaemia dan kemudiannya meninggal dunia pada 29 Mei 2010. Defendan memfailkan petisyen untuk kebenaran probet. Walau bagaimanapun, plaintif memasukkan kaveat terhadap petisyen dan memfailkan tindakan ini. Plaintif bergantung ke atas s 4(3) Akta Probet dan Pentadbiran 1959 ('Akta') dibaca bersama dengan s 20 untuk menyokong tuntutannya untuk menjadi sama ada wasi bersama estet si mati atau untuk menggantikan defendan.

Diputuskan:

(1) Niat pewasiat adalah penting dan setelah menilai keterangan keadaan peletusan hubungan di antara si mati dan plaintif, si mati jelas telah memikirkan secara positif untuk mengecualikan plaintif sama ada sebagai wasi dan/atau wasi bersama dan niat dan hasrat si mati mesti diberi penghormatan. Oleh itu, wasi yang dinamakan di dalam wasiat iaitu defendan patut menjadi wasi wasiat tersebut (lihat perenggan 3).

(2) Mahkamah tidak dapat menemui apa-apa asas untuk mengekalkan dakwaan tak kompeten dan kecuaian terhadap defendan. Defendan bertindak sebagai wasi bijak mengambilkira kepentingan estet si mati dan benefisiari-benefisiari (lihat perenggan 6(a)).

(3) Satu-satunya orang yang membantah defendan kekal sebagai wasi si mati

sebagai saudara lelaki si mati adalah plaintif. Anak-anak lelaki si mati berada di dalam mahkamah tetapi tidak memberikan keterangan terhadap defendan. Perintah-perintah yang akhirnya diberikan oleh mahkamah mengikut terma-terma wasiat dan juga membuat peruntukan untuk benefisiari-benefisiari berkaitan pembelanjaan-pembelanjaan mereka berikutan s 36(i) Akta Pemegang Amanah 1949 (lihat perenggan 6(d)).

(4) Plaintif tidak berpuashati kerana tiada peruntukan dibuat untuknya. Ini akan membuat kepada penulisan semula terma-terma wasiat dan sanctum menghormati hasrat si mati. Plaintif was not without means dan keterangan menunjukkan plaintif mempunyai dana yang substansial di Hong Kong. Untuk alasan ini, mahkamah tidak membenarkan tuntutan plaintif (lihat perenggan 6(d)).]

Notes

For cases on revocation of appointment, see 11 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2414–2418.

Legislation referred to

Probate and Administration Act 1959 ss 3, 4(3), 20
Rules of the High Court 1980 O 71 r 4(1)
Trustee Act 1949 s 36(i), 69

Vincent Lawrence (Jerry Ling with him) (Lawrence Hisham & Co) for the plaintiff.
Ringo Low (Ringo Low & Assoc) for the defendant.

Prasad Abraham J:

[1] In this matter the plaintiff has raised two issues:

(a) Whether the plaintiff is entitled to be appointed co-executor of the will together with the defendant or sole executor of the late Dato' Dr James Swee Lee Kong.

(b) Whether the plaintiff and the beneficiaries are entitled to reasonable allowance for provision of family expenses. The principal document that dictates the rights of parties is the will of the late Dato' Dr James Swee Lee Kong (the deceased) (pp 1–8) *Ikatan Dokumen Bersama A*.

[2] The brief preliminary facts of the case are:

(i) The Late Dato' Dr. James Swee Lee Kong (the Deceased) together with his wife of 18 years of marriage, Madam Siu Yan Tarn (the Plaintiff), were blessed with 2

sons by the name of Jonathan Swee Teck Jeanne, 17 years old (going 18 on 27.6.2011) and Jeremy Swee Teck Heanne, 12 years old (collectively known as the Beneficiaries). A

(ii) Unfortunately, on or about the end of August 2008, matrimonial differences between the Deceased and Plaintiff arose with allegations of infidelity hurled at the Plaintiff which is denied by her. B

(iii) The Deceased then engaged Mr. Cedric to seek his advice and to handle his divorce proceedings with the Plaintiff.

(iv) As the Deceased has also lost complete trust for his wife, he also instructed Mr Cedric to draft him a will whereby the Plaintiff was completely left out as a benefactor. C

(v) The Deceased also by passed the Plaintiff and appointed his brother Collin Swee Lay Keong (the Defendant) as the sole Executor and Trustee of his Estate for the benefit of the beneficiaries.

(vi) The will was signed and witnessed on 25.5.2009. D

(vii) Somewhere on or about middle of March 2010, the Deceased was diagnosed with leukaemia and was admitted to Sime Darby Medical Centre and underwent chemotherapy. He subsequently went to Singapore Gleneagles Hospital and was admitted on 15.4.2010 for treatment but sadly he lost his battle with leukaemia and passed away on 29.5.2010 in Singapore. E

(viii) Whilst the Deceased was warded for treatment at Sime Darby Medical Centre, there had been accusations that the Defendant had threatened to assault the Plaintiff when she asked for money from the Deceased (The Letter dated 19.3.2010 from Ms Lim & Hoh at pg. 20 of Bundle C refers). This has been denied. F

(ix) Differences also arose between the Plaintiff and the Defendant with regards to the Wake and funeral arrangements to be made for the Deceased.

(x) In the light of the fact that the Plaintiff and the Defendant could not see eye to eye on matters pertaining to the Deceased even before the tatter's demise, the Defendant started to take up the task as the appointed Executor and Trustee of the Estate immediately after the demise of the Deceased by collecting information and documents of the Deceased including correspondences. G

(xi) Being advised by his solicitors that probate may be applied for even without a complete list of assets and liabilities first and mindful of the fact that there are liabilities which are pressing, the Defendant had used his best endeavour to compile a list of assets and liabilities of the Estate and subsequently filed a petition for the grant of probate under Case No. S-32-727-2010 on 28.7.2010 (the Petition) H

(xii) However, the Plaintiff lodged a Caveat on 6.9.2010 (please refer to pp 39-40 of Bundle AA) against the Petition and subsequently on the directions of this Honourable Court filed the current suit on 2.12.2010. I

[3] The plaintiff relies on s 4(3) of the Probate and Administration Act 1959

(said Act) read together with s 20 to support the basis of her claim to be either a co-executor of the estate of the deceased or to replace the defendant as such. It is the plaintiff's contention that the Act and the will does not exclude the plaintiff's right to be appointed as a co-executor. However the intention of the testator is paramount and having evaluated the evidence of the state of detonation of the relationship between the deceased and the plaintiff, the deceased clearly had in mind to positively exclude the plaintiff either as an executor and/or the co executor and the deceased intention and wishes must be given effect to. It therefore follows that s 3 of the said Act, barring anything else the executor named in the will ie the defendant should be the executor of the will.

[4] The court however recognises that the plaintiff has a right to move this court and the court has a wide discretion as to whom it will issue grant of probate to. Both the Probate and Administration Act (the said Act) gives wide powers to the court to consider the application of the plaintiff (see *Probate & Administration in Singapore & Malaysia* G Raman, at p 72) NB s 4(3) of the said Act read together with O 71 r 4 sub-r 1 of the Rules of the High Court 1980 which is set out below:

> (1) The Registrar must not allow any grant to issue until all inquiries which he may see fit to make have been answered to his satisfaction.

[5] There is a point to be considered as to whether the matter of unfitness of the defendant to be the executor should have been argued before the SAR but since this matter was not raised, as it could be argued since the registrar was about to issue grant of probate to the defendant, restrained only by the plaintiff's caveat, the registrar was after making full inquiries satisfied the defendant was a fit and proper person to be the executor and there may arise the question would be for the plaintiff to move this court by way of an appeal from the decision of the senior assistant registrar but since this was not raised by parties, I proceeded to deal with the matter on the basis the court was empowered to do so.

[6] The learned author G Raman in his text has referred to four situations where the court may by pass the executor appointed in the will for some else (see pp 73–74).

(a) *Bad Character, financial position or ineptitude of the executor.*
The defendant is a business man and a lawyer by profession. The defendant was obviously trusted by the deceased and the deceased relied on the defendant especially in view of the detonating relationship between the deceased and his wife the plaintiff. The will itself is clear in terms. There are only two beneficiaries ie the sons to the marriage and the will only provides for them. At the time of the trial they were both

minors.

The plaintiff leveled various arguments as to the incompetency and negligence on the part of the defendant as executor. Having considered the evidence of the defendant particularly.

(A) MCDS Account

20. MCDS Account No. 045674199 (HLG Securities)

21 MCDS Account No. 058-003-008263154 (TA Securities)

Reasons (to be found in WS-DWS1)

Q23I refer you to page 1 to 5 of the Defendant's Additional Bundle of Documents (Bundle D) can you tell the court what these documents are?

A. Page 1 of my solicitor's letter to Bursa Malaysia Depository Sdn Bhd dated 1.7.2010 to enquire about the share that James might held and at page 2 to 5 is Bursa Malaysia's reply dated 6.7.2010 informing that there are two stocks found i.e. the Saujana Consolidated Berhad and ECM Libra Berhad. These two stock are listed in the List of Assets and Liabilities.

(B) Bank Account

23. Citibank, Malaysia A/C No. 0440-053-033

Reason (to be found in WS-DWS-1)

24QI refer you to page 6 to 7 of Defendant's Additional Bundle of Documents (Bundle D) can you tell the court what these documents are?

A Page 6 is my solicitor's letter to Citibank dated 1.7.2010 to enquire about James account with Citibank and page 7 is a reply dated 6.7.2010 by Citibank informing that there are only 4 accounts held by James. As such, the Citibank account No. 0440-053-003 was not listed in the List of Assets and Liabilities.

(C) Bank Account

28 UOB Bank, Singapore A/C No. 398-326-719-8, 301 -350-7854& 380-901-578-3

Reasons (to be found in WS-DWS-1)

25QI refer you to pages 8 to 9 of Defendant's Additional Bundle of documents (Bundle D), can you tell the court what these documents are?

A Page 8 is my solicitor's letter to UOB Limited dated 21.6.2010 to enquire about the accounts held by James and page 9 is the reply by UOB Limited dated 15.6.2010 informing us that they required a Grant of Probate to be obtained and resealed before releasing information of the account. As such 3 UOB accounts no.

398-326-719-8, no. 301-350-785-4 & no. 380-901-578-3 was not listed in the List of Assets and Liabilities.

(D) Bank Account

29 Royal Bank of Scotland, Singapore A/C No. 1010773301

Reasons (to be found in WS-DWS-1)

26QI refer you to page 10 to 11 of Defendant's Additional Bundle of Documents (Bundle D), can you tell the court what these documents are?

A. Page 10 is my solicitor's letter to ANZ Bank Group Limited dated 21.6.2010 to enquire about account no. 1010773301 and page 11 is the reply by ANZ Bank dated 30.7.2010. The reason why it is not listed in the List of Assets and Liabilities is because we only received the reply on 9.8.2010 whereas the Petition was filed on 28.7.2010.

(E) Bank Account

30 Credit Suisse Bank Singapore Account No.

Reasons (to be found in WS-DWS-1)

30QI refer you to page 19 of Defendant's Additional Bundle of Documents (Bundle D) can you tell the court what is this document?

A. Page 19 is my solicitor's letter to Credit Suisse Bank of Singapore dated 2.7.2010 to enquire about the account that James might held. However there is no reply by the bank yet. As such the account is not listed in the List of Assets and Liabilities. Once I obtained the relevant information, it will be included in the updated List of Assets and Liabilities.

(F) Bank Account

31 ABN AmroHollond AC No. 51.55.77.138

Reasons (to be found in WS-DWS-1)

29QI refer you to page 18 of Defendant's Additional Bundle of Documents (Bundle D) can you tell the court what is this document?

A Page 18 is my solicitor's letter to ABN AMRO Bank dated 2.7.2010 to enquire about account no. 51.55.77.138. However there is no reply by the bank yet. As such the account is not listed in the in the List of Assets and Liabilities. Once I obtained the relevant information, it will be included in the updated List of Assets and Liabilities.

(G) Bank Account

32 HSBC, United Kingdom A/C No. 02607514

Reasons (to be found in WS-DWS-1)

27Q I refer you to page 12 to 14 of Defendant's Additional Bundle of Documents (Bundle D), can you tell the court what these documents are?

A Page 12 is my solicitor's letter to HSBC, UK dated 29.6.2010 to enquire about account no. 02607514 and page 13-14 is the reply by HSBC, UK dated 19.7.2010. The reason why it is not listed in the List of Assets and Liabilities is because we only received the reply on 4.8.2010 whereas Petition was filed on 28.7.2010. furthermore they requested for further information and documentary proof.

(H) Bank Account

33 Lloyds Bank, United Kingdom A/C No. 1703491

Reasons (to be found in WS-DWS-1)

28Q I refer you to page 15 to 17 of Defendant's Additional Bundle of Documents (Bundle D), can you tell the court what these documents re?

A Page 15 is my solicitor's letter to Lloyds Bank dated 2.7.2010 to enquire about account no. 1703491 and page 16 to 17 is the reply by Lloyds Bank dated 19.7.2010. The reason why it is not listed in the List of Assets and Liabilities is because we only received the reply on 28.7.2010, which is the day the Petition was filed.

(I) Bank Account

34 Bradford & Bingley Bank, United Kingdom A/C No. 063 WA015816F

Reasons (to be found in WS-DWS-1)

31Q I refer you to page 20 of Defendant's Additional Bundle of Documents (Bundle D), can you tell the court what is this document?

A Page 20 is my solicitor's letter to Bradford & Bingley Bank, UK dated 2.7.2010 to enquire about the account no. 063 WA 015816F. However there is no reply by the bank yet. As such the account is not listed in the List of Assets and Liabilities. Once I obtained the relevant information, it will be included in the updated List of Assets and Liabilities.

I cannot find any basis to sustain the charge of incompetency and negligence against the defendant. I find the defendant acted as a prudent executor taking into account the interest of the estate of the deceased and the beneficiaries, as to the inaccuracies in the list of assets and liabilities, that matter has been resolved in court during the course of the trial.

(b) *The fact that he had an interest incompatible with the proper administration of the estate.*

Here again the court finds the plaintiff has failed to prove this.

His minor interest in the estate.
The defendant has no interest in the estate of the deceased and the only two beneficiaries are the sons of the deceased.

He is personally objectionable to the other persons entitled to share in the estate.
The only person objecting to defendant remaining as the executor of the deceased being the brother of the deceased, is the plaintiff. The sons of the deceased were in court but never testified against the defendant. The eldest son was about to enter university in the UK and would have been more then competent to testify. The orders eventually granted by this court followed the terms of the will and also made provision for the beneficiaries in respect of their expenses pursuant to s 36(i) Act 208 of the Trustee Act. However the plaintiff was still unsatisfied as no provision is made for her as set out in para 7(iii) of the statement of claim (p 21 bundle AA). This would tantamount to a rewriting of the terms of the will and the sanctum of respecting the deceased wishes. This in my view is what is driving the plaintiff to bring this suit. The plaintiff is not without means and evidence shows the plaintiff has substantial funds in Hong Kong. For these reasons, the court did not allow the plaintiff claim. The defendant by virtue of the plaintiff's action has not been allowed to act as executor and receive the grant of probate. Surely the defendant cannot now be expected to proceed to carry out his duties expeditiously to rein in the assets of the estate and deal with the liabilities which only would benefit the beneficiaries. During the course of his conduct as executor he is liable to account (s 69 of the said Act) and the plaintiff has no need to fear.

[7] In view of the relationship between the plaintiff and the sefendant, I considered the option of appointing Amanah Raya Bhd as the executor but both counsel for the plaintiff and the defendant were in unison that this option should not be considered by the court in view of the high costs and time. In the light of that I ruled out that option.

[8] For the aforesaid reasons, I made the orders that I did on 29 June 2011.

Order accordingly.

Reported by Kanesh Sundrum